No. 7102

United States Circuit Court of Appeals

For the Ninth Circuit

HARRY D. McCLEARY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Brief of Appellee

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA

WELLINGTON D. RANKIN,
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District of Montana.

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THURBER'S, HELENA

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STATEMENT OF THE CASE

The statement of the case presented by the appellant is substantially correct excepting that portion on page three of appellant's brief, which is purely argumentative and relates to disputed facts. Briefly, this is an action on a $10,000.00 War Risk Insurance policy applied for by appellant November 16, 1917. This action thereon, was filed April 26, 1932, claiming total and permanent disability of plaintiff from date of discharge, May 9, 1919. The answer raises as a defense, the issues that plaintiff was not totally and permanently disabled and that his policy lapsed on July 1, 1919 for failure to pay the premium thereon.

The cause was tried in the District Court on October 6, 1932. At the close of plaintiff's case defendant moved the court for a directed verdict in its favor, reserving the right to produce evidence on behalf of defendant and to renew the motion at the close of all the evidence. The trial court said (Tr. 56),

> "I think that the court will reserve the right to proceed, with this in mind, and your motion may be renewed at the end of the defendant's case. Pro forma the motion is denied."

Evidence was then submitted on behalf of the defendant. At the close of all the testimony defendant renewed its motion for a directed verdict and at the

close of the argument on said motion the court directed a verdict in favor of defendant from which plaintiff appeals.

The only issue in the case before this court is whether or not the trial court erred in directing a verdict for defendant. The determination of this issue renders the question of the admission and rejection of evidence, raised by appellant's assignments of error V and VI, immaterial.

ARGUMENT

NO SUBSTANTIAL EVIDENCE WAS OFFERED BY PLAINTIFF WHICH REQUIRED SUBMISSION OF THE CASE TO A JURY.

The first four assignments of error relate to different steps in the alleged error of the trial court, the directing of a verdict for defendant and may be answered by the same argument.

The question before this court is whether or not there is substantial evidence in the record that plaintiff was totally and permanently disabled during the life of his war risk insurance policy requiring the court to submit the case to a jury instead of directing a verdict for the defendant.

There is no evidence in the record that McCleary was totally and permanently disabled on July 1, 1919, when his policy lapsed.

In a zealous effort to show substantial evidence of total and permanent disability, sufficient to take this case to a jury, counsel for appellant have garbled and to a considerable extent misquoted in their brief the evidence as shown by the record.

On page 8 of appellant's brief counsel would indicate that McCleary testified he was *treated* by Dr. Duncan Alexander during the period *immediately after his discharge in May, 1919.* The word *treated* was not used by the witness but he said he *consulted* Dr. Alexander and does not say whether or not treatment was prescribed, or given. In fact the deposition of Dr. Alexander shows, (Tr. 34), that he "first examined McCleary in May, 1920", almost a year after his policy had lapsed.

Page 9 of appellant's brief is replete with misquotations of the evidence. Appellant says,

> "Left Spokane and went to California to benefit my health."

The evidence really is (Tr. 16):

> "I thought California might be beneficial to my condition so I went from Spokane to California, to San Jose, where I worked***."

There is a vast difference in going to California to work and to benefit one's health. The witness said he thought California might be beneficial to his condition. Does not state whether financial, social or what and certainly does not use the word health.

Again on page 9 of his brief, counsel stated:

> "Went to San Francisco; did not *attempt* to work for several months, then *attempted* to work, etc. ***."

The plain statement of the witness is (Tr. 17):

> "I went to San Francisco and after several months I went to work***."

There is nothing said by the witness about attempting or not attempting to work.

There is scarcely a page of the statement of evidence in appellant's brief which does not contain unwarranted statements and inferences not contained in the record. One of the most glaring is contained on page 12 of appellant's brief quoting from the deposition of Dr. Alexander. The brief says:

> "Made clinical diagnosis with bacteriological findings of tubercular infection."

The record shows (Tr. 35) the evidence to be:

> "The symptoms were fever, continued cough with expectoration purulent, repeated examina-

tion of which showed *negative for tubercular organisms.*"

"At that time my diagnosis of his condition, clinically and *not from bacteriological findings* was a tubercular infection, which in my judgment was the thing that was prevalent."

And on (Tr. 38) Dr. Alexander said:

"I want the court and jury to understand that the diagnosis I have given was made simply from *clinical findings.* The bacteriological findings *are negative insofar as my records show,* that is so far as tuberculosis is concerned."

This mis-statement of the evidence cannot be passed by us unnoticed.

We also desire to call attention to an important omission of a portion of a sentence by appellant without indicating any omission which entirely modifies a statement on page 15 of his brief. The appellant in giving the testimony of Dr. Hobson, says:

"Taking into consideration the condition, I found when I first examined him I think the plaintiff has been continuously active since 1920."

The record (Tr. 49) shows that the above quotation is only a part of a sentence and what the doctor really did say was:

> "*If it were established in my mind to be correct that continuously since the plaintiff has had night sweats and temperature, cough with expectoration, and later developed positive sputum* taking into consideration the conditon I found when I first examined him, I think the plaintiff has probably been continuously active since 1920."

Comment is unnecessary to show the importance of the italicised portion of the sentence omitted and the false light placed on the testimony by its omission.

NO WITNESS LAY OR MEDICAL TESTIFIED THAT PLAINTIFF WAS TOTALLY AND PERMANENTLY DISABLED PRIOR TO 1932.

Taking from the record the testimony of the witnesses for plaintiff in the order in which they testified it is apparent there is no evidence of total permanent disability in July, 1919.

The plaintiff McCleary did not claim total permanent disability on July 1, 1919, in his testimony.

His testimony as to his vocational training and work record would also refute total permanent disability. His direct statements make it positive that he was not then totally and permanently disabled. He says (Tr. 20):

"I do not dispute that at the time of my discharge on May 9, 1919, my physical condition was 'Good'."

"I was not discharged for physical reasons." (Tr. 20-21).

"I guess I didn't, at that time, claim I was totally disabled from either gas influenza or tuberculosis." (Tr. 20-21).

The mere statements of defendant that he was not able to work is not sufficient to take the case to a jury.

In the case of United States v. Diehl (C. C. A. 4) 62 F. (2d) 343 at 344 and 345, the court said:

"But there is nothing in that case which holds that *mere general statements by the insured that he was not able to work are sufficient to carry the case to the jury* on the issue of total and permanent disability in the face of positive and uncontradicted testimony that he has in fact worked with reasonable regularity over long periods of time. ***

"But partial disability existing at the time of lapse does not warrant a recovery, even though total disability may subsequently result; and total disability based upon conditions which at the time of lapse do not render it reasonably certain that such total disability will continue through life is not to be deemed permanent, *even though a subsequent change of conditions may render such disability permanent in character.* See Eggen v. U. S., supra.

"While it is shown that he had tuberculosis at the time of his discharge from the Army, it is not shown that his condition was such as to render it reasonably certain that the disease would permanently disable him. On the contrary, the evidence is that shortly after his discharge the disease was found to be in an arrested state. See Nicolay v. U. S., supra.

"For the reasons stated, there was error in denying the motion of the defendant for a directed verdict, and the judgment is accordingly reversed." (Italics ours).

NO WITNESS TESTIFIED THAT PLAINTIFF WAS TOTALLY AND PERMANENTLY DISABLED WHEN HIS POLICY LAPSED.

It is likewise certain that the testimony of plaintiff's wife JOSEPHINE McCLEARY (Tr. 28) throws no light on plaintiff's condition July 1, 1919. They were married in July, 1923, and she testifies:

"I had met Mr. McCleary in Spokane the year before I married him."

She did not know plaintiff until 1922, three years after his policy lapsed.

Appellant, on page 11 of his brief states that plaintiff's testimony is corroborated by his wife in the par-

ticulars he sets forth. She could not have corroborated any of his testimony relating to the period prior to 1922. It is also apparent that her statement as to McCleary being gassed was purely hearsay as the record shows she said "he told me so", (Tr. 28).

Appellant also on page 12 of his brief quotes the witness as saying:

> "I also observed night sweats right away after we were married."

Notwithstanding, the record (Tr. 29) gives the witness' testimony as:

> "I also observed the *indications* of night sweats that he testified to."

We believe that the word "indications" has sufficient significance that it should not have been omitted from appellant's brief.

While the testimony of plaintiff's wife throws no light whatsoever on plaintiff's condition July 1, 1919, we think it does prove that plaintiff was not totally and permanently disabled at a later date. She testified (Tr. 31):

> "I should think that we might understand that he started to work there in the summer in June or July of 1924, in San Francisco, working for the Pomin Corset Company, doing the same thing show card writing and display work. His salary

I think was about the same, $30.00 (weekly). *He continued in the employment of the Pomin Corset Company for over three years.*"

The deposition of DR. DUNCAN L. ALEXANDER (Tr. 33) contains nothing upon which total permanent disability could be predicated July 1, 1919, or at any other time.

Dr. Alexander's testimony was from the records of his office showing that he first examined McCleary on May 16, 1920. He was under Dr. Alexander's care until July 19, 1920, a period of approximately 64 days. Dr. Alexander says, (Tr. 34):

"I found him suffering from a cough, purulent expectoration, temperature continued."

"I visited the patient during that time, examined several specimens of sputum, myself, and had two sputums examined by laboratory, at Dr. Hal Bieler's laboratory, the sputum *in all cases being negative for tubercular organisms* but continued (contained) staphylococci and streptococci." (Tr. 34).

"I further examined the patient on the third day of July; the name here is in the bookkeeper's handwriting, but the notation is mine. The symptoms were fever, continued cough with expectoration purulent, repeated examination of which *showed negative for tubercular organisms.*" (Tr. 35).

"At that time my diagnosis of his condition, clinically and not from bacteriological findings, was a tubercular infection, which in my judgment was the thing that was prevalent. Asked if I would classify that as active pulmonary tuberculosis, well it was certainly very active, diseased condition at that time, but my *diagnosis was clinical and not with bacteriological evidence.*" (Tr. 35).

"I must have taken into consideration the history *that he gave me* at the time. All the symptoms I found existing at the time I had Mr. McCleary under observation were fever and a continued cough with expectoration, difficulty in breathing, continued temperature, pain in the chest, with dullness in one of the lungs. The pain in the chest was partially a pleurisy pain. *The other symptoms that I have given might be symptoms that would be found in asthma or bronchitis. I want the court and jury to understand that the diagnosis I have given was made simply from clinical findings. The bacteriological findings* are negative, in so far as my records show, that is, *so far as tuberculosis is concerned.* To the best of my remembrance I have not seen the plaintiff professionally, since July, 1920." (Tr. 38).

Dr. Alexander did not positively diagnose plaintiff's condition in 1920 as active tuberculosis, much less testify as to its permanency at any time or particularly in July, 1919.

The strongest the doctor would go when asked if he would classify the condition of plaintiff as active pulmonary tuberculosis (Tr. 35) was that it was very active diseased condition at that time "but my diagnosis was clinical and not with bacteriological evidence".

There is also nothing in the testimony of MRS. E. M. McCLEARY, mother of plaintiff, which would inindicate that plaintiff was permanently disabled. She testified, (Tr. 41 and 42):

> "Asked if I have noticed any change in his condition now from what it was when he first got out of the army. Well, in appearance he has improved; he is improved now over what he was when he first came home."

The testimony of DR. G. D. WALLER (Tr. 43) shows that he did not examine plaintiff until March 1932. He testified that at that time he considered plaintiff totally and permanently disabled from tuberculosis. He, of course, would not be competent to testify that plaintiff was totally and permanently disabled in July, 1919, and he offers no such testimony. In fact his testimony would indicate that plaintiff was not permanently and totally disabled.

The doctor testified (Tr. 45):

> "A great many men, by proper care and proper

> sanitation, work over long periods of years with active tuberculosis. In certain stages active tuberculosis is curable." (Tr. 45).

As to the presence of staphylococci and streptococci in the sputum tests made by Dr. Hal Bieler, the witness said:

> "I will say that it would not mean much of anything. It wouldn't mean that he had tuberculosis and it wouldn't mean that he did not have it." (Tr. 46).

As to whether or not plaintiff had tuberculosis in 1920 when examined by Dr. Alexander, the strongest statement Dr. Waller would make was (Tr. 47):

> "As to the most I would say being that it is possible he had tuberculosis in 1920, I would say it is probable."

DR. JAMES D. HOBSON testified for the plaintiff. There is nothing in his testimony that would tend to prove total permanent disability of plaintiff before 1932. He did not examine plaintiff until a few months before the trial. This witness did not testify positively to plaintiff's condition in 1932 even. Appellant's brief (pp. 14 and 15) states that this doctor testified:

> "He had fibrosis tuberculosis active***. He is totally disabled; it is reasonably certain that

he will continue totally disabled the remainder of his life."

The record shows, however, that the testimony is:

"***He I thought had a fibrous tuberculosis which was active *at that time.*" (Tr. 47),

and

"*I think* he is totally disabled." (Tr. 48),

and

"*I think* it is reasonably certain the plaintiff will continue totally disabled the remainder of his life." (Tr. 48).

The strongest statement made by the witness, a portion of which sentence was omitted by appellant on page 15 of his brief is:

"*If it were established* in my mind to be correct that continuously since *the plaintiff* has had night sweats and temperature, cough with expectoration and later developed positive sputum, taking into consideration the condition I found when I first examined him *I think* the plaintiff has *probably* been continuously active since 1920." (Tr. 49).

This statement is no evidence of total permanent disability in 1919. In fact it is pure speculation based upon a supposition which the doctor does not say existed and if it did exist he thinks the plaintiff has

probably been active since 1920, not since 1919 when the policy lapsed.

This doctor further showed in cross examination that he did not think plaintiff was totally or permanently disabled prior to 1932. He testified (Tr. 51):

> "I think that the majority of cases of chronic tuberculosis show periods of a rest when they are apparently not active. No one can say how long those periods of rest will be—an indeterminate time; it depends on the personal equation and the resistance and upon the circumstances. *The condition might, indeed, become arrested and stay arrested for the balance of his lifetime and of course, any time less, ten years or five years, when he would be handicapped little or none by such disease,*—that is true,"

and the witness further said, (Tr. 52):

> "Judging, then, from such testimony as I have already heard, *I think that no one could say positively that the plaintiff had been active without a period of remission, since 1920, with no other evidence to go upon.*"

Upon re-direct examination of the witness by counsel for plaintiff, the witness said, (Tr. 53):

> "I don't recall having testified that it is my belief that the plaintiff has been continuously active since he had the influenza; I think he has had tuberculosis all the time, but may have had

periods of quiesence, which occur in a lot of cases, of course, quiesence means inactive, arrested."

No other evidence was submitted by plaintiff except the testimony of the foregoing witnesses and we submit that there is no substantial evidence of total permanent disability in the record. To say that the plaintiff was totally and permanently disabled on July 1, 1919, is pure conjecture and surmise. The case should not have gone to the jury, and the judgment of the trial court should stand. In the case of Wire vs. United States (C. C. A. 5) 63 Fed. (2d) 307, 308 the court well said:

> "While it is certainly the law that the question of total and permanent disability, where there is any evidence to support a finding of it, is for the jury, it is also clear that *the court must not submit a case where there is nothing but conjecture and surmise to rest a verdict on.*
>
> "It is undoubtedly true that cases are not to be lightly taken from the jury; that jurors are the recognized triers of questions of fact. * * * Hence it is that seldom an appellate court reverses the action of a trial court in declining to give a peremptory instruction for a verdict one way or the other. At the same time, the judge is primarily responsible for the just outcome of the trial. *He is not a mere moderator of a town meeting*, submitting questions to the jury for

> determination, nor simply ruling on the admissibility of testimony, but one who in our jurisprudence stands charged with full responsibility. *He has the same opportunity that jurors have for seeing the witnesses, for noting all those matters in a trial not capable of record, and when in his deliberate opinion there is no excuse for a verdict save in favor of one party, and he so rules by instructions to that effect, an appellate court will pay large respect to his judgment.* Patton v. Texas & R. P. Co., 179 U. S. 659, 21 S. Ct. 275, 276, 45 L. Ed. 361." (Italics ours).

TUBERCULOSIS IS CURABLE AND NOT NECESSARILY TOTALY AND PERMANENTLY DISABLING.

Even if plaintiff had tuberculosis when discharged there is no evidence that it would permanently disable him. In United States v. Rentfrow, et al, (C. C. A. 10), 60 Fed. (2d) 488 at 489, the court says:

> "We are of the opinion that this case is ruled by the decisions of this court in Nicolay v. United States, 51 F. (2d) 170; Hirt v. United States, 56 F. (2d) 80; and Roberts v. United States, 57 F. (2d) 514. There is evidence sufficient to support the trial court's finding that the insured was suffering from pulmonary tuberculosis when he was discharged from the Army. There is no evidence, however, of the permanence of the disability. The only direct evidence on the subject

is that of Dr. Calhoun, who testified that in 1922 his condition was not a permanent one, and that the disease would probably have been arrested if the insured had followed the treatment suggested. It is suggested by appellees that liability exists unless evidence affirmatively discloses that the condition was not a permanent one. We are cited to Humble v. United States, 49 F. (2d) 600, 601, where the District Court allowed a recovery because it was 'impossible to say that the disease would not continue active for the rest of his life.' But the burden of proof is upon the plaintiff to prove that the disability was permanent, that is, 'founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it.' *This burden is not carried by leaving the matter in the realm of speculation.*"

* * * * * *

"An incipient tubercular stands at a crossroads: If he continues his ordinary activities, his condition is a hopeless one. On the other hand, if he will follow a program of complete rest and wholesome nourishment for an indicated period, the chances are strongly in favor of an arrested condition and a substantial cure. Many times the choice is a hard one, particularly when the economic circumstances of the insured are considered. *But we cannot believe that liability upon these contracts of insurance should be determined by the conduct of the insured after the policy has lapsed, nor by economic circumstances*

which may influence that conduct. We can find no support, in this record, for a finding that tuberculosis with which insured was afflicted had progressed to the incurable stage when his policy lapsed in August, 1919. For that reason, the motion of the government should have been sustained. For a strikingly similar case, see Eggen v. United States (C. C. A. 8) 58 F. (2d) 616." (Italics ours).

THE WORK RECORD OF PLAINTIFF DISPROVES TOTAL PERMANENT DISABILITY.

The record discloses that plaintiff was gainfully employed over a considerable period of time. His testimony shows (Tr. 21):

> "I made a claim to the United States government. As to my stating in that claim made, it is said, on the 18th of June, 1920, that from the time of my discharge from the Army, in answering the questions concerning my occupation since discharge, and the dates, I stated that I was farming from May, 1919, to July, 1919 at $75 per month, and that I worked at the carpenter trade in July, 1919, for two weeks, and asked what I have to say as to that employment. Well, in farming, my father had a little five-acre tract in Twin Falls, and I guess that's what I meant by farming."

"I married in 1923, which was after my training period. (Tr. 21). *At the time I was married I was receiving $35.00 a week or somewhere around there in wages. $30 or $35 a week as I remember it, at San Jose;* I believe I had been working for two, or three months, as I remember it, for these people at San Jose, before I was married, at the figures stated." (Tr. 22).

"I was receiving very little compensation or support from the Government, as I recall it; at the time of my marriage, I believe $10 a month."

"I believe I started in this training (vocational) the late fall of 1920." "I received $100 a month from the Government." (Tr. 22). "As I remember it, *I had that training about nine months.* As I remember it, I started in training again about three or four months later and continued for approximately nine months or a year in Spokane. I quit training because I wanted to go to California (Tr. 22-23) * * *." "I thought California might be beneficial to my condition so I went from Spokane to California to San Jose, where I worked for Al Harkness Sons at show card writing, off and on, as I remember, for about a year." (Tr. 16).

"After quitting that place I went to San Francisco and after several months, *I went to work there for the Pomin Corset Company, doing the same kind of work* show card writing." (Tr. 17).

"The next job I had was with Hale Brothers, in San Francisco." (Tr. 17).

It appears that McCleary worked for Hale Brothers at show card writing and selling radios in the radio department. (Tr. 17 and 18).

The testimony of JOSEPHINE McCLEARY, wife of plaintiff, shows (Tr. 30):

> "I was married in July, 1923. Shortly after that we returned to San Jose to live. During that time my husband was occupied in doing show card writing. He stayed there in employment in San Jose after we were married until the following April which would be April, 1924. During that period he received a salary or wages of $30 a week." (Tr. 30).
>
> "In San Francisco he worked for the William C. Pomin Corset Company." (Tr. 30).
>
> "I should think we might understand that he started to work there in the summer, in June or July of 1924, in San Francisco, working for the Pomin Corset Company, doing the same thing, show card writing and display work. His salary I think was about the same, $30.00. *He continued in the employment of the Pomin Corset Company for over three years.*" (Tr. 31).

We contend that the work record of plaintiff disapproves total permanent disability.

The case of United States vs. Kims (C. C. A. 9) 61 Fed. (2d) 644 at 648, decided by this court is a much stronger case for the plaintiff than the case at

bar. In that case three doctors testified that plaintiff was totally and permanently disabled from date of discharge and this court reversed a judgment for plaintiff using the following language:

> "Plaintiff's right of recovery, if at all, is upon contract. He must establish permanent and total disability prior to the time his policy lapsed for nonpayment of premiums. Whatever may have been the effect of subsequent developments of his ailment or disease, the record of his employment with the Simmons Bed Company is such that he could not have been totally and permanently disabled within the definition of those terms during the time of such employment. This conclusion is in accord with the views expressed by this court in United States v. Seattle Title Trust Co., 53 F. (2d) 435, and United States v. Rice, 47 F. (2d) 749. The following cases also are in point: United States v. Harrison (C. C. A.) 49 F. (2d) 227; Ross v. United States (C. C. A.) 49 F. (2d) 541; Nalbantian v. United States C. C. A.) 54 F. (2d) 63. Judgment reversed."

The Court held in United States vs. Pullig (C. C. A. 8) 63 Fed. (2d) 379 at 383, as follows:

> "The liability of the government is contractual, and that contract provides for payment to the insured for total and permanent disability occurring during the life of the policy. It did not insure against partial disability. The fact that witnesses expressed the opinion that insured was totally

disabled does not overcome the undisputed facts showing that the insured actually worked with sufficient regularity that substantial earnings resulted therefrom, even though he suffered interruptions in carrying on his business and discomfort in so doing. Such opinions cannot be accepted as constituting substantial evidence. United States v. Harth (C. C. A.) 61 F. (2d) 541; United States v. Fly (C. C. A.) 58 F. (2d) 217; Nicolay v. United States (C. C. A.) 51 F. (2d) 170, 173; United States v. Peet (C. C. A.) 59 F. (2d) 728; United States v. Wilson (C. C. A.) 50 F. (2d) 1063, 1064; United States v. Lyle (C. C. A.) 54 F. (2d) 357; United States v. Martin (C. C. A.) 54 F. (2d) 554, 556; Long v. United States (C. C. A.) 59 F. (2d) 602; United States v. Barker (C. C. A.) 36 F. (2d) 556; Nalbantian v. United States (C. C. A.) 54 F. (2d) 63; United States v. Hairston (C. C. A.) 55 F. (2d) 825; United States v. Rice (C. C. A.) 47 F. (2d) 749.

Again in Roberts vs. United States (C. C. A. 10) 57 Fed. (2nd) 514 at 515-16 the court said:

> "The cited case is in many respects similar in facts to the case at bar, and it was there held that, in the face of a showing of an employment in a substantially gainful occupation for a considerable period of time by one seeking relief under the terms of a policy as here considered, *even though he may have shown himself to be suffering from tuberculosis,* he had not dis-

> charged the burden placed upon him as plaintiff in the case of showing that he was totally and permanently disabled at all times necessary to mature the policy. The authorities are exhaustively cited in this well-considered opinion of the court and a reiteration of them here would serve no useful purpose. A case somewhat similar as to facts in which relief was denied to the plaintiff is United States v. McLaughlin, 53 F. (2d) 450 (C. C. A. 8). A more recent case in our own court is Hirt v. United States, 56 F. (2d) 80 (C. C. A. 10), decided January 26, 1932. Both of the Tenth Circuit cases stress the point that it is incumbent upon the plaintiff to produce some substantial proof that, admitting plaintiff was suffering from the disease complained of before the time that his policy elapsed, it must also be established that his disability was then one which would with reasonable certainty continue throughout his life." (Italics ours).

That the plaintiff may now be totally and permanently disabled is of no avail. His policy lapsed before it matured.

In Eggen vs. United States (C. C. A. 8) 58 Fed. (2nd) 616 on pages 619-620, the court said:

> "The subsequent death or subsequent permanence of the disability does not always create an inference that the disability was permanent before the lapse of the policy. If it did, then whenever in one of these cases there was evidence of

total disability from a certain disease before lapse, and death or total and permanent disability from a continuation of the same disease after lapse, the case would be for the jury, regardless of what the disease may have been. If, at the time of the lapse of the policy, all the conditions upon which the total disability was founded then failed to make it reasonably certain that the disability would continue throughout the lifetime of the insured, the policy did not mature. If it did not mature, it lapsed, and, if subsequently and as the disease progressed, other conditions arose which made it reasonably certain that the insured could never recover, those later conditions cannot be used to mature a policy which had ceased to exist. A man with influenza, mumps, measles, whooping cough, or scarlet fever may be a totally disabled man (and a certain percentage of deaths result from those diseases) but no one could properly contend that an insured under a policy of war risk insurance so totally disabled had a matured policy on the day the disability occurred, if he thereafter died or the disability subsequently became permanent as a result of the disease or as the result of his own failure to take treatment, or the combined result of both." * * *

"In this case, while the question of the sufficiency of the evidence to establish total disability is not free from doubt, we think it would have justified a finding that the insured was totally disabled as a result of incipient tuberculosis at the time his policy lapsed, and that this disease did

not become arrested, and later caused permanent disability and finally death. We think, however, there was no substantial evidence that the conditions which existed while the policy was alive made it reasonably certain that the total disability would last throughout the lifetime of the insured. The medical testimony of the appellant did not establish the existence of such conditions prior to October 1, 1919. The probabilities then were that the insured would recover. He was advised by his doctor, in September, 1919, to take treatment so that he might be cured. The testimony introduced by the government, and not disputed, indicated that the chances for the recovery of a man in his condition—assuming it to be as described by the appellant's evidence—prior to the lapse of the policy, were at least 8 to 2; and courts recognize the fact that tuberculosis in its incipient stage is usually not an incurable malady. See Nicolay v. United States, supra; Hirt v. United States, supra. A finding that the insured was permanently disabled on October 1, 1919, or prior thereto, would not only be without substantial support in the evidence, but would necessarily be based solely upon speculation and conjecture."

This Court has held in the case of United States vs. McCreary (C. C. A. 9) 61 Fed. (2nd) 804 at 807:

"If appellee was not totally and permanently disabled at discharge and all of the time since, his present condition and reasonable certainty as to

> his future condition is immaterial. There is no evidence carrying a quality of proof or having fitness to produce conviction that reasonable minded persons may fairly differ as to whether or not it proves the fact in issue. There is no such evidence as total and permanent disability."

And again in the same case we think the statement of this court is decidedly applicable to the case at bar when it said (P. 808):

> "The court is not concerned with the present condition of the appellee, except as it relates to total and permanent disability at the date of discharge, and at all times since that date, and the disability must have had its origin at or prior to the date of discharge, be total, and reasonably certain to be permanent during lifetime. And there is no substantial evidence in support of this fact."

THE TRIAL COURT DID NOT ERR IN THE ADMISSION OR REJECTION OF EVIDENCE.

Appellant practically abandons assignments of error Numbered 5 and 6, as only a half page of his brief is devoted to discussing them and no reference is made to the record. The assignments do not properly place any issue before this court for the reason that they do

not quote the substance of the evidence admitted and rejected.

The decision of the issue raised by the first four assignments of error will also render assignments five and six immaterial.

The objection by appellant was to the introduction of examination reports of appellant made by government doctors, the records being a part of the official records of the Veterans Bureau. We contend there was no error in the admission of these records and believe that this matter is fully determined in United States vs. Wescoat 49 Fed. (2nd) 193-195 where the Court said:

> "We think it perfectly clear that these papers and the entries thereon fall within the exceptions to the hearsay rule";

and in Long vs. United States (C. C. A. 4) 59 Fed. (2nd) 602, these papers are held admissible and in that connection the court said on pages 603 and 604:

> "As to necessity, these reports of examining physicians are made ordinarily by physicians of the Veterans Bureau who are either not available as witnesses or whose testimony, if they are available, can be secured only at great trouble and expense. Moreover, their testimony when produced is ordinarily a mere recital of what is contained in their reports, to which they must look for the

purpose of refreshing the memory; and every one with experience in conducting litigation knows that as a matter of fact such reports are more reliable than the memory of the witnesses who made them, and that, if a witness without giving good reason therefor should contradict the statements contained in the reports, the reports would be accepted by any trier of facts in preference to the oral testimony. The examining physicians of the government examine hundreds of disabled soldiers. The written record of the examination made at the time is undoubtedly more trustworthy than the treacherous memory of a busy man dealing with many cases having many points of similarity. It is clear, therefore, not only that it is necessary as a practical matter that these reports be received if evidence is to be had of the matters which they relate, but also that they are more dependable than would be the oral testimony of the witnesses who made them, and are, in reality, the best evidence obtainable as to such matters."

CONCLUSION

We challenge appellant to show from the record any evidence whatsoever, medical, lay, documentary or otherwise that plaintiff was totally and permanently disabled July 1, 1919. To conclude from the evidence that plaintiff was then totally and permanently disabled is purely a matter of conjecture and speculation.

The government did not insure plaintiff against having tuberculosis but against death or total permanent disability. To hold that in a case of tuberculosis which becomes totally and permanently disabling thirteen years after the lapse of the policy of insurance, the government is liable under its contract based upon total and permanent disability while the policy is in force, is certainly an unwarranted interpretation of that contract.

From the evidence before it there was no alternative for the trial court. A verdict for defendant was properly directed in a carefully considered opinion and we respctfully submit that the judgment of the trial court should be affirmed.

Respectfully submitted,

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